

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

BRUCE GLASOW, on behalf of himself)	
and all others similarly situated,)	
)	
Plaintiff-Appellant,)	
)	
v.)	Case No. 20040321
)	
E.I. DUPONT DE NEMOURS and)	
COMPANY; PIONEER HI-BRED)	
INTERNATIONAL; and MONSANTO)	
COMPANY,)	
)	
Defendants-Appellees.)	

**BRIEF OF DEFENDANTS-APPELLEES
MONSANTO COMPANY,
E.I. DUPONT DE NEMOURS AND COMPANY,
and PIONEER HI-BRED INTERNATIONAL**

On Appeal from the Judgment and Order of the District Court,
East Central Judicial District
Cass County, North Dakota
Cass County Civ. No. 09-04-C-00702
Honorable Judge Lawrence A. Leclerc

Stephen W. Plambeck -- ND #03240
Joel Fremstad --ND #05541
**NILLES, ILVEDSON, STROUP,
PLAMBECK & SELBO, LTD.**
1800 Radisson Tower
201 N. Fifth Street, Suite 1800
P.O. Box 2626
Fargo, ND 58108
Telephone: (701) 237-5544

Robert Weiner
Judith Bernstein-Gaeta
Anthony Franze
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: (202) 942-5000

ATTORNEYS FOR DEFENDANT-APPELLEE MONSANTO COMPANY
(counsel continued on inside cover)

Patrick J. Ward – ND #03626
Lawrence King – ND #04997
ZUGER KRIMIS & SMITH
P.O. Box 1694 (U.S. Mail only)
316 North Fifth Street
Sixth Floor – Provident Bldg.
Bismark, ND 58502
Telephone: (701) 223-2711

James Denvir
Scott E. Gant
BOIES SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW, Suite 800
Washington, DC 20015
Telephone: (202) 237-2727

ATTORNEYS FOR DEFENDANTS-APPELLEES E.I. DUPONT DE NEMOURS AND
COMPANY AND PIONEER HI-BRED INTERNATIONAL, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE AND FACTS.....	2
A. Mr. Glasow’s Complaint Below And Related Litigation	2
B. Mr. Glasow Enters Agreement With Monsanto And “Withdraws” From This Case	3
C. Mr. Finken Moves To Intervene	4
D. The Order And Judgment Below And Mr. Glasow’s Appeal.....	5
ARGUMENT	6
I. THE COURT SHOULD DISMISS THIS APPEAL BECAUSE MR. GLASOW LACKS APPELLATE STANDING	6
A. The Judgment Did Not Affect Mr. Glasow’s Interests, And He Therefore Lacks Standing To Appeal	6
B. Mr. Glasow Does Not Have Standing To Challenge The Order Denying Mr. Finken’s Motion To Intervene.....	10
II. EVEN IF MR. GLASOW HAD STANDING TO APPEAL, THE DISTRICT COURT’S JUDGMENT SHOULD BE AFFIRMED	12
A. The District Court Did Not Err In Construing Mr. Glasow’s Motion To “Withdraw” As A Voluntary Dismissal Notice.....	12
B. Rule 23(l) Was Inapplicable Because Mr. Glasow Had Not Sought Class Certification And The Suit Therefore Was His Alone	15
III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. FINKEN’S MOTION TO INTERVENE	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

<i>Applebaum v. State Farm Mut. Auto Ins. Co.</i> , 109 F.R.D. 661 (M.D. Pa. 1986).....	17-18
<i>Bell v. City of Kellogg</i> , 922 F.2d 1418 (9th Cir. 1991).....	9-10
<i>Bernhardt v. Fritzshall</i> , 293 N.E.2d 650 (Ill. App. Ct. 1973).....	13
<i>Bernhardt v. Rummel</i> , 319 N.W.2d 159 (N.D. 1982).....	7-8, 10
<i>Bogus v. Am. Speech & Hearing Ass’n</i> , 582 F.2d 277 (3d Cir. 1978).....	11
<i>Boland v. Engle</i> , 113 F.3d 706 (7th Cir. 1997).....	8
<i>Camacho v. Mancuso</i> , 53 F.3d 48 (4th Cir. 1995).....	13
<i>Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Township</i> , 2002 ND 83, 643 N.W.2d 685.....	5
<i>DeCoteau v. Nodak Mut. Ins. Co.</i> , 2001 ND 182, 636 N.W.2d 432.....	15-16
<i>Dubuque v. Iowa Trust</i> , 587 N.W.2d 216 (Iowa 1998).....	15
<i>Geaney v. Carlson</i> , 776 F.2d 140 (7th Cir. 1985).....	9
<i>Grinaker v. Grinaker</i> , 553 N.W.2d 204 (N.D. 1996).....	17
<i>Hawkins v. Singer</i> , No. Civ. 02-4098, 2003 WL 22076552 (D. Minn. Sept. 2, 2003).....	13
<i>Head v. Jellico Hous. Auth.</i> , 870 F.2d 1117 (6th Cir. 1989).....	18

<i>Hennon v. Principi</i> , No. 00 C 4539, 2002 WL 31174454 (N.D. Ill. Sept. 30, 2002).....	13
<i>Hoffman v. Berry</i> , 139 N.W.2d 529 (N.D. 1966).....	13
<i>Kjolsrud v. MKB Mgmt. Corp.</i> , 2003 ND 144, 669 N.W.2d 82.....	11
<i>Korioth v. Briscoe</i> , 523 F.2d 1271 (5th Cir. 1975).....	10, 18
<i>LeCompte v. Mr. Chip</i> , 528 F.2d 601 (5th Cir. 1976).....	7-9, 12
<i>Lovin v. Lovin</i> , 1997 ND 55, 561 N.W.2d 612.....	17
<i>Machella v. Cardenas</i> , 653 F.2d 923 (5th Cir. 1981).....	11
<i>Machella v. Cardenas</i> , 659 F.2d 650 (5th Cir. 1981).....	11
<i>Nodak Mut. Ins. Co. v. Ward County Farm Bureau</i> , 2004 ND 60, 676 N.W.2d 752.....	6
<i>North Dakota Mineral Interests, Inc. v. Berger</i> , 509 N.W.2d 251 (N.D. 1993).....	17
<i>Old Broadway Corp. v. Hjelle</i> , 411 N.W.2d 81 (N.D. 1987).....	15
<i>Omnibus Fin. Corp. v. United States</i> , 566 F.2d 1097 (9th Cir. 1977).....	12
<i>Reynolds Jamaica Mines, Ltd. v. La Societe Navale Caennaise</i> , 239 F.2d 689 (4th Cir. 1956).....	12
<i>Roe v. Town of Highland</i> , 909 F.2d 1097 (7th Cir. 1990).....	17
<i>S. Nat’l Life Realty Corp. v. People’s Bank of Bardstown</i> , 198 S.W. 543 (Ky. Ct. App. 1917).....	13

<i>Safeguard Bus. Sys., Inc. v. Hoeffel</i> , 907 F.2d 861 (8th Cir. 1990).....	14, 17
<i>Smalley v. United States</i> , No. 92-1052, 1992 WL 448499 (W.D. Tenn. Nov. 20, 1992).....	13
<i>Stewart v. N.D. Workers Comp. Bureau</i> , 1999 ND 174, 599 N.W.2d 280.....	5
<i>Szarkowski v. Reliance Ins. Co.</i> , 404 N.W.2d 502 (N.D. 1987).....	16-17
<i>Trugreen Ltd. P'ship v. Rogers</i> , No. Civ. 3:97-CV-0606-H, 1997 WL 733860 (N.D. Tex. Nov. 18, 1997).....	13
<i>Unemployment Comp. Div. v. Bjornsrud</i> , 261 N.W.2d 396 (N.D. 1977).....	7, 11
<i>Univ. of S. Ala. v. Am. Tobacco Co.</i> , 168 F.3d 405 (11th Cir. 1999).....	13
<i>Warden v. Crown Am. Realty Trust</i> , No. Civ.A.96-25J, 1998 WL 725946 (W.D. Pa. Oct. 15, 1998).....	17-18
<i>Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.</i> , 898 F.2d 1371 (8th Cir. 1990).....	17
<i>Williams v. Clarke</i> , 82 F.3d 270 (8th Cir. 1996).....	7

STATUTES AND RULES

N.D.R. Civ. P. 23.....	15-16
N.D.R. Civ. P. 24.....	11
N.D.R. Civ. P. 41.....	7
N.D.R. Ct. 7.1.....	5
Fed. R. Civ. P. 23.....	15
Fed. R. Civ. P. 24.....	11
Fed. R. Civ. P. 41.....	7

MISCELLANEOUS

Report of the Judicial Conference Committee on Rules of Practice and Procedure, 215 F.R.D. 158	16
8 Moore's Federal Practice § 41.33 (3d ed. 2004).....	7-8
46 Am. Jur. 2d <i>Judgments</i> § 620 (2004).....	12

PRELIMINARY STATEMENT

Why are we here? Mr. Glasow – the person who initiated this lawsuit and the only plaintiff ever in the case – asked to withdraw from the action. Defendants consented to his withdrawal and the district court, interpreting Mr. Glasow’s request to “withdraw” as a voluntary dismissal notice, entered a judgment *without prejudice*. Regardless of the outcome of this appeal, Mr. Glasow has made clear to the Defendants and to the district court that he will not pursue his claims further. He wanted out, and he got what he asked for. He has no stake in this litigation and no right to dictate the procedure or the form of the dismissal that followed his request. In short, Mr. Glasow lacks standing to appeal a judgment that afforded him the relief he requested below.

That leaves Mr. Finken, the individual represented by Mr. Glasow’s counsel, who sought to intervene. Mr. Finken has not filed a brief with this Court, and did not oppose Defendants’ motion to dismiss his appeal. In fact, speaking on behalf of Mr. Glasow, the same lawyers also representing Mr. Finken have asserted that “no appeal lies for Mr. Finken at this time.” Although this Court has denied Defendants’ motion to dismiss Mr. Finken’s appeal (*see* Dk. # 25, 30, 33), it is clear that Mr. Glasow has no standing to speak for Mr. Finken or litigate Mr. Finken’s interests. But if the Court now considers Mr. Finken a party to this appeal, the district court did not abuse its discretion in finding that Mr. Finken has no “common question of law or fact” with Mr. Glasow, a person who withdrew from the case and abandoned all his claims.

Finally, affirming the judgment will not shut the courthouse doors on these individuals. As noted, the district court entered judgment on Mr. Glasow’s claims without prejudice, as Mr. Glasow requested. Nothing the district court did bars Mr.

Glasow or Mr. Finken from filing a new complaint should either choose to do so – again raising the question: why are we here?

This Court should affirm.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents two threshold issues regarding Mr. Glasow's standing:

1. Whether a plaintiff who requested an order "permitting [him] to withdraw, without prejudice, as a party plaintiff" has standing to appeal a judgment dismissing his claims without prejudice.
2. Whether a plaintiff who has withdrawn from a case has standing to appeal a district court's denial of a third party's motion to intervene, which the plaintiff did not join.

If the Court finds that Mr. Glasow has standing, this appeal presents two additional questions:

1. Whether a district court abuses its discretion in treating a motion to "withdraw" from a lawsuit by the only plaintiff as a notice of voluntary dismissal.
2. Whether a district court abuses its discretion in denying permissive intervention on the grounds that the plaintiff's withdrawal left no case in which to intervene, or alternatively, that the intervenor could not have any "common question of law or fact" with a plaintiff who had abandoned all his claims.

STATEMENT OF THE CASE AND FACTS

A. Mr. Glasow's Complaint Below And Related Litigation

On March 9, 2004, Plaintiff Bruce Glasow filed his Complaint against Defendants Monsanto Company, E.I. duPont de Nemours and Co., and Pioneer Hi-Bred International, Inc. in the Cass County District Court. Mr. Glasow alleged that

Defendants' sale of genetically modified crop seed, which incorporated Monsanto's patented technologies, violated North Dakota antitrust laws and common law. (Appendix of Plaintiff-Appellant ("PA") 3-4, 24-27, ¶¶ 1-5, 79-104). Mr. Glasow's suit was just one of thirteen virtually identical actions filed by his national counsel against Defendants in thirteen different states (the "State Court Actions").

On June 8, 2004, Monsanto sued the State Court Action plaintiffs in the United States District Court for the Eastern District of Missouri (the "Missouri Federal Action").¹ The Missouri Federal Action alleges, among other things, that the State Court Action farmer-plaintiffs held licenses allowing them to use Monsanto's patented gene technology and that the farmer-plaintiffs breached those licenses by failing to bring their lawsuits in the Missouri courts, as required by forum selection clauses in the licenses. (PA 53-66). Because Mr. Glasow signed a patent license agreement mandating that his Complaint be filed exclusively in Missouri, he initially was named as a Defendant in the Missouri Federal Action. (PA 55, ¶ 25).

B. Mr. Glasow Enters Agreement With Monsanto And "Withdraws" From This Case

Before Defendants even responded to his Complaint, Mr. Glasow expressed his wish not to pursue any claims in this litigation and formally moved to "withdraw" from the case.

Specifically, in June 2004, Mr. Glasow's lawyers represented to Monsanto that "Mr. Bruce Glasow (ND) has requested that we withdraw him from our case against Monsanto, Pioneer, and DuPont, provided that Monsanto correspondingly drop him as a

¹ Defendants Pioneer and DuPont later joined the Missouri Federal Action as intervenor-plaintiffs.

defendant in its” Missouri Federal Action. (PA 68). Monsanto responded that, pursuant to Mr. Glasow’s request, “and in light of the early stage of the Missouri federal case, Monsanto agreed to dismiss Mr. Glasow from the federal suit.” (PA 73). Thereafter, Monsanto dismissed Mr. Glasow from the Missouri Federal Action. (PA 38, 47).

In light of his agreement to withdraw, on June 30, 2004, Mr. Glasow stipulated that Defendants need not answer or otherwise respond to his Complaint below because “Mr. Glasow, the Plaintiff, intends to withdraw from this proceeding.” (PA 31). On July 9, 2004, Mr. Glasow formally sought to “withdraw” from the case. (PA 34-35). As agreed, Defendants did not oppose his withdrawal.

C. Mr. Finken Moves To Intervene

When Mr. Glasow moved to withdraw from the action, Mr. Finken, a non-party also represented by Mr. Glasow’s counsel, moved to intervene. (PA 39-41). Intervention was not mentioned in Mr. Glasow’s June 16, 2004 offer to withdraw from the case. (PA 68). Plaintiff’s counsel first raised the issue in a June 21, 2004 letter to Monsanto’s counsel. (PA 70). Monsanto, however, never consented to intervention. (PA 73). Rather, Monsanto agreed only to keep the intervention issue completely separate from its dismissal of Mr. Glasow from the Missouri Federal Action. (*Id.*)

Defendants opposed Mr. Finken’s motion to intervene on two principal grounds. First, Defendants argued that “Mr. Glasow’s notice of his intent to withdraw in a prior court filing *and his formal request now*, in effect, constitute notice of voluntary dismissal.” (PA 48) (emphasis added). As there was no plaintiff, there was no live controversy into which Mr. Finken could intervene. (PA 47-49). Second, Defendants argued in the alternative that Mr. Finken could not satisfy the requirements of North Dakota Rule of Civil Procedure (“N.D.R. Civ. P.”) 24(b) because he necessarily had no

“question of law or fact in common” with someone who abandoned all his claims. (PA 49).

D. The Order And Judgment Below And Mr. Glasow’s Appeal

On August 10, 2004, the district court denied Mr. Glasow’s motion to withdraw and Mr. Finken’s motion to intervene. (PA 86). As permitted by the rules, *see, e.g.*, N.D.R. Ct. 7.1, the district court issued a short Order finding that “Plaintiff Glasow’s motion, including proposed intervenor Finken’s motion, is denied for the reasons cited in Defendants’ Memorandum of Law filed with this Court on July 23, 2004.” (PA 86).² The reasons cited in Defendants’ Memorandum of Law were that, because Mr. Glasow had abandoned his claims, there was no live controversy in which Mr. Finken could intervene. (PA 47-49). In accordance with the Order, in September 2004, the Court entered an Order for Judgment and Judgment. (PA 87-88).

On November 15, 2004, both Messrs. Glasow and Finken filed a notice of appeal (PA 93), but only Mr. Glasow ever filed a brief. Accordingly, Defendants moved to dismiss Mr. Finken’s appeal. (Dk. # 25). Only Mr. Glasow responded to that motion. (*See* Dk. # 30, Plaintiff-Appellant’s Response in Opp’n to Defs.’ Mot. to Dismiss (“Pl. MTD Opp.”)). He argued that, in light of the district court’s order below, “no appeal lies for Mr. Finken at this time.” (*Id.* at 2). He also argued, in the alternative, that “if Mr.

² Mr. Glasow offers a narrow characterization of the district court’s Order, overlooking that the Order must be construed broadly because “an appellee may attempt to save a favorable ruling by urging any ground asserted in the trial court.” *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Township*, 2002 ND 83, ¶ 26 n.1, 643 N.W.2d 685; *accord Stewart v. N.D. Workers Comp. Bureau*, 1999 ND 174, ¶ 37, 599 N.W.2d 280 (same). Mr. Glasow also chides Judge Leclerc for issuing a short order. The form of the Order was well within Judge Leclerc’s discretion. *See* N.D.R. Ct. 7.1. Moreover, Judge Leclerc did not need to issue *any* order because, as explained below, Mr. Glasow’s withdrawal was self-executing. No court order is necessary to

Footnote continued on next page

Finken is a proper appellant . . . the brief in support of Mr. Glasow’s appeal suffices to protect Mr. Finken’s rights.” (*Id.*) And he offered yet another alternative argument, urging the Court to “regard Mr. Glasow’s opening brief as being a joint brief, on behalf of both Mr. Glasow and Mr. Finken, and include Mr. Finken as a party to this appeal.” (*Id.* at 5).³

On January 20, 2005, this Court denied Defendants’ motion to dismiss Mr. Finken’s appeal. (Dk. # 33). It presently is unclear whether or not counsel for Mr. Glasow and Mr. Finken intend to treat Mr. Finken as a party to the appeal. In either case, the Judgment should be affirmed.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS APPEAL BECAUSE MR. GLASOW LACKS APPELLATE STANDING

A. The Judgment Did Not Affect Mr. Glasow’s Interests, And He Therefore Lacks Standing To Appeal

Mr. Glasow abandoned his lawsuit and will not proceed with his claims regardless of the outcome of this appeal. Win or lose, the only thing Mr. Glasow has ever told the Defendants or the court is that he wants out of the case. As such, he lacks appellate standing. *See Nodak Mut. Ins. Co. v. Ward County Farm Bureau*, 2004 ND 60, ¶ 11, 676 N.W.2d 752 (appellant has burden to establish standing).

Footnote continued from previous page
effectuate a voluntary dismissal. Further, Judge Leclerc did not need to enter a judgment entry, but did so at Mr. Glasow’s request.

³ Of course, only Mr. Finken can make a request to include him as a party, or treat Mr. Glasow’s brief as his own – which he has not done at all, let alone in a timely fashion. Since filing a notice of appeal, Mr. Finken has not taken a single step to pursue his appeal.

“[O]nly a party or person aggrieved by a judgment or order of the district court can appeal from it to the Supreme Court. In order to be entitled to an appeal as an aggrieved person, a party must have some legal interest that may be enlarged or diminished by the decision appealed from.” *Bernhardt v. Rummel*, 319 N.W.2d 159, 160 (N.D. 1982) (citations and internal quotation marks omitted).

Here, Mr. Glasow was not aggrieved by the judgment below, which effected a dismissal without prejudice. He fails to assert *any* interest of his own that would be enlarged or diminished by this appeal. It is a basic procedural tenet that “a voluntary dismissal without prejudice is ordinarily nonappealable because it does not qualify as an involuntary adverse judgment, in that [1] the plaintiff receives the relief requested and [2] [plaintiff] is free to recommence the action.” 8 Moore’s Federal Practice § 41.33[8][d] (3d ed. 2004) (commenting on Fed. R. Civ. P. 41);⁴ *accord, e.g., Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996) (“The effect of a voluntary dismissal without prejudice pursuant to Rule 41(a) is to render the proceedings a nullity and leave the parties as if the action had never been brought.”) (internal quotation marks and citation omitted); *LeCompte v. Mr. Chip*, 528 F.2d 601, 603 (5th Cir. 1976) (dismissal without prejudice nonappealable “since the plaintiff has acquired that which he sought, the dismissal of his action and the right to bring a later suit on the same cause of action, without adjudication on the merits”). That basic tenet applies here.

⁴ As Mr. Glasow recognizes, N.D.R. Civ. P. 41 is identical to Fed. R. Civ. P. 41 save for stylistic and other minor changes. (Pl. Br. at 12 n.7). Accordingly, cases interpreting the federal rule have been considered highly persuasive. *See Unemployment Comp. Div. v. Bjornsrud*, 261 N.W.2d 396, 398 (N.D. 1977).

First, Mr. Glasow was not aggrieved because the judgment gave him, in substance, exactly what he requested. Mr. Glasow requested an order “permitting him to withdraw, without prejudice, as a party plaintiff.” (PA 34). Mr. Glasow’s principal argument on appeal is that the district court erred in construing his request as a notice of dismissal. (Brief for Plaintiff-Appellant (“Pl. Br.”) at 9-21). That, however, is a red herring. The real issue is whether Mr. Glasow received *in substance* the relief requested. He did. Whether or not the suit continued without him, Mr. Glasow is out of the case. Therefore, he could not be aggrieved by the judgment.

In *Bernhardt*, for instance, the appellant argued that the court violated a procedural rule by granting the appellant’s request for costs, but ordering the wrong party to pay them. 319 N.W.2d at 160. This Court held that, having received the substance of what he asked for, the appellant lacked standing to appeal the claimed technical violation of the rule. *Id.* Here, Mr. Glasow seeks merely to change *the form* of his exit from the case. His substantive rights would not be any greater or lesser whether the court construed his motion as one to “withdraw” or as a voluntary dismissal notice.

Second, Mr. Glasow lacks standing because he does not “have some legal interest that may be enlarged or diminished by the decision appealed from.” *Id.* at 160. Simply put, this appeal is academic because Mr. Glasow abandoned his claims. Further, even if he intended to proceed with the case, the judgment was *without prejudice* and Mr. Glasow has identified no impediment to refiling a lawsuit. *See* 8 Moore’s Federal Practice § 41.33 (3d ed. 2004); *accord Boland v. Engle*, 113 F.3d 706, 714 (7th Cir. 1997) (dismissal without prejudice “is appealable only if it legally prejudices the plaintiff

by severely circumscrib[ing] the plaintiff's ability to reinstate his lawsuit") (citations and internal quotation marks omitted).⁵

Indeed, federal courts addressing situations substantially similar to this one have barred appeals for lack of standing. In *Geaney v. Carlson*, the plaintiff requested relief from a magistrate's transfer order or, in the alternative, a dismissal. 776 F.2d 140, 141 (7th Cir. 1985). The magistrate interpreted the filing as a notice of voluntary dismissal. *Id.* The Court of Appeals for the Seventh Circuit held that the plaintiff could not appeal because the dismissal was without prejudice. *Id.* at 142.

Similarly, in *Bell v. City of Kellogg*, the plaintiff filed a "motion for voluntary discontinuance, which [the trial court] interpreted as a motion for voluntary dismissal." 922 F.2d 1418, 1421 (9th Cir. 1991). The plaintiff appealed the dismissal, arguing that "he intended to assign his interest in the suit" to another individual. *Id.* The Court of Appeals for the Ninth Circuit held the plaintiff lacked appellate standing because the dismissal was without prejudice:

Because the dismissal was without prejudice, the only possible impairment of rights here is the district court's alleged failure to recognize that [plaintiff's] motion might have been conditioned on his assignment of rights to Bell. The language of the motion, however, was not conditional, nor did it recite any authority for such an assignment. Under the circumstances, [plaintiff] suffered no impairment of rights.

⁵ Mr. Glasow recognizes that Rule 41 dismissals generally are not appealable because they do not result in the entry of final judgment. (Pl. Br. at 9 n.4). But he ignores the authority holding that even when such dismissals are final orders, the plaintiffs still lack standing to appeal. See *LeCompte*, 528 F.2d at 603 ("Where the trial court allows the plaintiff to dismiss his action without prejudice, the judgment, of course, qualifies as a final judgment for purposes of appeal. Ordinarily, though, plaintiff cannot appeal therefrom, since it does not qualify as an involuntary adverse judgment so far as the plaintiff is concerned.") (quoting 5 Moore's Federal Practice § 41.05(3) (2d ed. 1975)).

Id. at 1422.

Here, Mr. Glasow's motion to withdraw was not conditioned on the district court approving Mr. Finken's intervention. Indeed, such a condition would have violated Mr. Glasow's agreement with Monsanto and contradicted his consistent representation that he does not want to pursue his claims. (PA 38) (Glasow Mot. to Withdraw: "Mr. Glasow's counsel has reached an agreement with Monsanto's counsel to withdraw Mr. Glasow as party plaintiff in this Action provided that Monsanto . . . correspondingly dismiss Mr. Glasow as a defendant" in the Missouri Federal Action). Further, he cites no authority permitting a "conditional" withdrawal. But even if Mr. Glasow had imposed such a condition, as *Bell* holds, that would not confer standing to appeal.

In sum, Mr. Glasow has not – and cannot – show any negative effect on *him* from the judgment. Because Mr. Glasow has no standing, the appeal should be dismissed.

**B. Mr. Glasow Does Not Have Standing To Challenge
The Order Denying Mr. Finken's Motion To Intervene**

Counsel for Messrs. Glasow and Finken already have contended that "no appeal lies for Mr. Finken at this time." (Dk. # 30, Pl. MTD Opp. at 2). Nothing the district court did prevents Mr. Finken from filing his own lawsuit if he so chooses. In any event, Mr. Glasow does not have standing to appeal the order denying Mr. Finken's motion to intervene. It was, after all, Mr. Finken's motion, not Mr. Glasow's. Mr. Glasow was not "injuriously affected by the decision" nor does he have a legal interest that was either diminished by the district court's order or that would be enlarged if the ruling were reversed. *Bernhardt*, 319 N.W.2d at 160.

Even if *Mr. Finken* were somehow injured by the denial of his intervention request – and he was not⁶ – Mr. Glasow would not have standing to seek redress for Mr. Finken’s injury. In order to have standing, “plaintiffs generally must assert their own legal rights and interests and cannot rest their claim for relief on the legal rights and interests of third parties.” *Kjolsrud v. MKB Mgmt. Corp.*, 2003 ND 144, ¶ 14, 669 N.W.2d 82.

Courts interpreting the federal counterpart to N.D.R. Civ. P. 24 have found appellants lack standing in circumstances similar to those here.⁷ In *Machella v. Cardenas*, for example, the district court denied the class certification motion filed by Machella, the sole named plaintiff, because he did not have a valid claim. 653 F.2d 923, 925 (5th Cir. 1981) (“*Machella I*”). Machella sought to amend his complaint to name a second plaintiff, in order to “save” the class action. *Machella v. Cardenas*, 659 F.2d 650, 652 (5th Cir. 1981) (denying rehearing of *Machella I*). The district court treated the amendment as a Rule 24 motion for intervention and denied it. *Id.* at 651. On appeal, the court found that “Machella was not aggrieved by the denial of [] intervention, [and therefore] he ha[d] no standing to contest its rejection.” *Machella I*, 653 F.2d at 927.

Similarly, in *Bogus v. American Speech & Hearing Ass’n*, the district court denied class certification in an action brought by a single named plaintiff. 582 F.2d 277, 282 (3d Cir. 1978). Three parties then sought to intervene, “intending to ask for reconsideration

⁶ See *Korioth v. Briscoe*, 523 F.2d 1271, 1279 n.25 (5th Cir. 1975) (“When an appellant has other adequate means of asserting its rights, a charge of abuse of discretion in the denial of a motion for permissive intervention would appear to be almost untenable on its face.”).

⁷ N.D.R. Civ. P. 24 is virtually identical to Fed. R. Civ. P. 24, and thus, these federal cases are particularly instructive here. See *Bjornsrud*, 261 N.W.2d at 398.

of the class action requested.” *Id.* The court granted summary judgment for the defendant before deciding the intervention motion. On appeal by the single named plaintiff, the court held that “[t]he plaintiff, not being aggrieved by the district court’s failure to act in [the intervention] matter, d[id] not have standing to raise the issue.” *Id.* at 291.

These cases reflect a fundamental jurisdictional rule: parties have standing to assert their own rights, not those of other people. Mr. Glasow’s attempt to appeal the order denying Mr. Finken’s motion is at odds with that basic rule. Accordingly, this Court should dismiss this appeal.

II. EVEN IF MR. GLASOW HAD STANDING TO APPEAL, THE DISTRICT COURT’S JUDGMENT SHOULD BE AFFIRMED

A. The District Court Did Not Err In Construing Mr. Glasow’s Motion To “Withdraw” As A Voluntary Dismissal Notice

The district court did not err in treating Mr. Glasow’s motion to withdraw as a self-executing notice of voluntary dismissal. Neither the Rules of Procedure nor case law require courts to follow the unduly formalistic approach posited by Mr. Glasow.

Courts and commentators have treated “withdrawals” and voluntary dismissals as the same thing, and Mr. Glasow identifies no material difference. *See* 46 Am. Jur. 2d *Judgments* § 620 (2004) (“A single voluntary dismissal, nonsuit, or discontinuance of an action is generally regarded as a mere withdrawal of the plaintiff’s claim”); *Omnibus Fin. Corp. v. United States*, 566 F.2d 1097, 1103 n.26 (9th Cir. 1977) (describing withdrawal of a complaint as, “in effect, [a] voluntary dismissal”); *LeCompte*, 528 F.2d at 604 (stating that Rule 41 “allows the plaintiff to *withdraw* his action from the court without prejudice to future litigation”) (emphasis added); *Reynolds Jamaica Mines, Ltd. v. La Societe Navale Caennaise*, 239 F.2d 689, 692 (4th Cir. 1956) (“[A] withdrawal is

no less effective and no less valid than a voluntary dismissal without court order.”); *Trugreen Ltd. P’ship v. Rogers*, No. Civ. 3:97-CV-0606-H, 1997 WL 733860, at *2 (N.D. Tex. Nov. 18, 1997) (“Withdrawal of a claim by amendment would appear to be the substantive and functional equivalent of voluntary dismissal of a claim without prejudice.”); *Smalley v. United States*, No. 92-1052, 1992 WL 448499, at *1 (W.D. Tenn. Nov. 20, 1992) (treating notice “withdrawing” claim as motion for voluntary dismissal); *see also Bernhardt v. Fritzshall*, 293 N.E.2d 650, 655 (Ill. App. Ct. 1973) (“A withdrawal . . . connotes nothing more than a voluntary dismissal”); *S. Nat’l Life Realty Corp. v. People’s Bank of Bardstown*, 198 S.W. 543, 545 (Ky. Ct. App. 1917) (“We are unable to discover any material difference, in effect, between a withdrawal and a dismissal”).

The district court thus did not err in treating the lone plaintiff’s motion to “withdraw” as a notice of voluntary dismissal. *See* cases cited *supra* p. 9; *accord Hennon v. Principi*, No. 00 C 4539, 2002 WL 31174454, at *7 (N.D. Ill. Sept. 30, 2002) (construing representations in plaintiff’s brief as motion for voluntary dismissal); *Hawkins v. Singer*, No. Civ. 02-4098, 2003 WL 22076552, at *2 (D. Minn. Sept. 2, 2003) (construing letter “canceling” complaint as voluntary dismissal notice).⁸

⁸ The standard of review applicable to a district court judgment construing a voluntary withdrawal as a Rule 41(a)(1) voluntary dismissal appears to be a matter of first impression for this Court. There is a dearth of law on the subject, presumably because plaintiffs who voluntarily dismiss their suits ordinarily do not have standing to seek review of those dismissals. The cases cited by Mr. Glasow in support of a *de novo* standard are not instructive. This appeal does not present a situation where the dismissal first “required the district court to determine a complex substantive issue of [North Dakota] law,” *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999), nor does it present a case where the court was required to “ensure that both parties agreed to the dismissal.” *Camacho v. Mancuso*, 53 F.3d 48, 51 (4th Cir. 1995) (dealing with Rule 41(a)(1)(ii) dismissal by stipulation). More analogous cases suggest that review should be for abuse of discretion. *See, e.g., Hoffman v. Berry*, 139 N.W.2d 529, 533 (N.D. 1966) (order of dismissal under Rule 41(a)(2) is reviewed for an abuse of

Footnote continued on next page

Mr. Glasow tries to evade the district court's common sense determination by mischaracterizing both the court's Order and Mr. Glasow's agreement and request to withdraw. First, Mr. Glasow creates a straw man by framing the issue as whether Mr. Glasow's "mere intent to withdraw" in the future constitutes a voluntary dismissal notice. (Pl. Br. at 3 (Issue Statement # 1); *see also id.* at 1, 9 & n.4). As Defendants explained in the district court (and as the district court agreed in its Order), "Mr. Glasow's notice of his intent to withdraw in a prior court filing *and his formal request now*, in effect, constitute notice of voluntary dismissal." (PA 48) (emphasis added).

Second, Mr. Glasow now implicitly suggests that his withdrawal was conditioned on the intervention of Mr. Finken and therefore cannot be construed as a voluntary dismissal notice. (*See* Pl. Br. at 11 n.5). The record is clear, however, that the parties treated Mr. Glasow's withdrawal completely independent from the intervention issues. (PA 73). Mr. Glasow unequivocally sought to abandon his claims, conditioned only upon his being dropped from the Missouri Federal Action. (PA 38).

Mr. Glasow notified the court that he was abandoning the action when he filed his motion to withdraw his claims. Upon expressing his abandonment, this suit was terminated without the need for further action by the court. *See Safeguard Bus. Sys., Inc. v. Hoeffel*, 907 F.2d 861, 863 (8th Cir. 1990). Accordingly, there was no suit from which to "withdraw," and the court properly denied Mr. Glasow's motion.

Footnote continued from previous page
discretion). In any event, as the district court's ruling was correct, it should be affirmed under any standard.

B. Rule 23(l) Was Inapplicable Because Mr. Glasow Had Not Sought Class Certification And The Suit Therefore Was His Alone

Though Mr. Glasow repeatedly states otherwise (Pl. Br. at 2-3, 15-20), his suit was not a “class action.” No class was ever certified, nor did Mr. Glasow ever move for class certification. Thus, North Dakota Rule of Civil Procedure 23(l) did not require a hearing before the district court could process Mr. Glasow’s voluntary dismissal.

As Mr. Glasow notes, N.D.R. Civ. P. 23 is “analogous” to Federal Rule of Civil Procedure 23 and interpretations of the Federal Rule illuminate the North Dakota Rule.⁹ (Pl. Br. at 16-18). The North Dakota Rule provides that “[u]nless certification has been refused under subdivision (b), a *class action*, without approval of the court after a hearing, may not be (A) dismissed voluntarily” N.D.R. Civ. P. 23(l) (emphasis added). Until recently, Federal Rule 23(e) contained a similar provision requiring that “[a] *class action* shall not be dismissed or compromised without approval of the court.” (emphasis added). Like North Dakota’s rule, the earlier language of the Federal Rule did not specify if the restrictions applicable to “class actions” included cases in which the class had not yet been certified, and courts were split on whether the rule applied to non-certified *putative* class actions.

An amendment in 2003 clarified Federal Rule 23, explaining that judicial approval is *not* necessary when a plaintiff voluntarily dismisses a putative class action suit prior to class certification. *See* Fed. R. Civ. P. 23(e)(1)(A) (“The court must approve

⁹ Actually, North Dakota, like Iowa, adopted the Model Class Actions Rule. Federal Rule 23(e) is analogous to the Model Rule and courts have relied on federal cases to interpret the Model Rule. *Dubuque v. Iowa Trust*, 587 N.W.2d 216, 221-22 (Iowa 1998); *see also Old Broadway Corp. v. Hjelle*, 411 N.W.2d 81, 83 n.1 (N.D. 1987) (noting that Federal Rule 23 and the Model Rule adopted in North Dakota have similar language and philosophy); *DeCoteau v. Nodak Mut. Ins. Co.*, 2001 ND 182, ¶ 11, 636 N.W.2d 432 (reviewing cases concerning Federal Rule 23 to interpret North Dakota Rule 23).

any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a *certified class.*”) (emphasis added). The amendment was designed “to resolve[] the ambiguity in the former Rule” that some courts incorrectly “read to require court approval of settlements with putative class representatives that resolved only individual claims.” *Id.* (advisory committee note to 2003 amend).

The 2003 amendment clarified, rather than changed, Rule 23. And as the report of the Judicial Conference Committee on Rules of Practice and Procedure explains, “[a]pproval is not required . . . before a class is certified since putative class members are not bound by the settlement.” 215 F.R.D. 158, 188.

The current language of the Federal Rule is consistent with the principle enunciated by this Court in *DeCoteau v. Nodak Mutual Insurance Co.*, 2001 ND 182, ¶ 15, 636 N.W.2d 432, that until a class is certified, a plaintiff advances only his or her own claims.¹⁰ Simply put, Rule 23(*l*) never came into play because this suit was not certified as a “class action.”

In any event, Mr. Glasow failed to preserve this issue for review. He raised it for the first time in his reply brief below, which is not adequate to enable him to pursue it here. *Cf. Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502, 503 (N.D. 1987).

¹⁰ Though Mr. Glasow observes that *DeCoteau* does not involve a Rule 41(a)(1) voluntary dismissal, that distinction does not detract from the significance of the decision here. In *DeCoteau* this Court endorsed the rule that “[w]hen a named plaintiff’s individual claim becomes moot before a class has been properly certified . . . dismissal of the action is required.” 2001 ND 182, ¶ 15, 636 N.W.2d 432. This is consistent with the current interpretation of Federal Rule 23 that, until a suit is certified as a class action, there are no class plaintiffs or claims, only individual plaintiffs and claims.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING MR. FINKEN'S MOTION TO INTERVENE

A district court's decision to grant or deny a Rule 24(b) request for permissive intervention stands unless it is an abuse of discretion. *See N. D. Mineral Interests, Inc. v. Berger*, 509 N.W.2d 251, 254 (N.D. 1993). Abuse of discretion is an "extremely deferential" standard. *See, e.g., Lovin v. Lovin*, 1997 ND 55, ¶ 14, 561 N.W.2d 612. As this Court has explained, "[a]n abuse of discretion is never assumed; the burden is on the party seeking relief to affirmatively establish it" by showing that the decision was "arbitrary, unconscionable, or unreasonable," or was not "the product of a rational mental process leading to a reasoned determination." *Grinaker v. Grinaker*, 553 N.W.2d 204, 207 (N.D. 1996).

In this case, Mr. Glasow's notice of withdrawal ended the action. *Safeguard Bus. Sys.*, 907 F.2d at 863. As even Mr. Glasow and Mr. Finken's counsel contend, "the motion to intervene was moot when filed." (Pl. MTD Opp. at 1). Therefore, it was perfectly rational and, indeed, quite appropriate for the court to deny Mr. Finken's motion to intervene in a non-existent action. *See, e.g., Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) (denial of motion to intervene upheld because case had been voluntarily dismissed and thus "there remained no case in which to intervene"); *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990) (denial of motion to intervene proper where no action left in which to intervene); *Applebaum v. State Farm Mut. Auto Ins. Co.*, 109 F.R.D. 661, 663-64 (M.D. Pa. 1986) (summary judgment of lone putative class representative's claims rendered intervention improper); *cf. Warden v. Crown Am. Realty Trust*, No. Civ.A. 96-25J, 1998 WL 725946, at *7 (W.D. Pa. Oct. 15, 1998) ("declin[ing] to permit intervention into an otherwise defunct claim").

Even if some remnants of the case had subsisted after Mr. Glasow had withdrawn, the district court did not abuse its discretion in agreeing with Defendants' alternative argument that, "[e]ven assuming that, as a technical matter, a live controversy lingered on, Mr. Finken could not meet the requirements of Rule 24" because "[h]e necessarily has no 'question of law or fact in common' with someone who has abandoned his claims and withdrawn from the litigation." (PA 49; *cf. Warden*, 1998 WL 725946, at *7; *Applebaum*, 109 F.R.D. at 664). That alone is ground for affirmance.

Finally, no matter what the district court's basis for denying the motion to intervene, there was no abuse of discretion because the district court did not bar Mr. Finken from simply filing a suit of his own: "When an appellant has other adequate means of asserting its rights, a charge of abuse of discretion in the denial of a motion for permissive intervention would appear to be almost untenable on its face." *Korioth v. Briscoe*, 523 F.2d 1271, 1279 n.25 (5th Cir. 1975); *see also Head v. Jellico Hous. Auth.*, 870 F.2d 1117, 1124 (6th Cir. 1989).

CONCLUSION

For the reasons set forth above, the Court should dismiss this appeal or affirm the judgment below.

Word Count: 6,913

Dated: January 31, 2005

Stephen W. Plambeck

Stephen W. Plambeck – ND #03240

**NILLES, ILVEDSON, STROUP,
PLAMBECK & SELBO, LTD.**

1800 Radisson Tower

201 N. Fifth Street, Suite 1800

P.O. Box 2626

Fargo, ND 58108

Telephone: (701) 237-5544

Local Counsel for Defendant Monsanto Company

Robert Weiner

Judith Bernstein-Gaeta

Anthony Franze

ARNOLD & PORTER LLP

555 Twelfth Street, NW

Washington, DC 20004-1206

Telephone: (202) 942-5000

Facsimile: (202) 942-5999

Lead Counsel for Defendant Monsanto Company

Patrick J. Ward

Patrick J. Ward – ND #03626

Lawrence King – ND #04997

ZUGER KRIMIS & SMITH

P.O. Box 1694 (U.S. Mail only)

316 North Fifth Street

Sixth Floor – Provident Bldg.

Bismark, ND 58502

Telephone: (701) 223-2711

Facsimile: (701) 223-7387

***Local Counsel for Defendants E.I. duPont de Nemours
and Company and Pioneer Hi-Bred International, Inc.***

James Denvir

Scott E. Gant

BOIES SCHILLER & FLEXNER LLP

5301 Wisconsin Avenue, NW, Suite 800

Washington, DC 20015

Telephone: (202) 237-2727

Facsimile: (202) 237-6131

***Lead Counsel for Defendants E.I. duPont de Nemours
and Company and Pioneer Hi-Bred International, Inc.***

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

BRUCE GLASOW, on behalf of himself)	
and all others similarly situated,)	
)	
Plaintiff-Appellant,)	
)	
v.)	Case No. 20040321
)	
E.I. DUPONT DE NEMOURS and)	
COMPANY; PIONEER HI-BRED)	
INTERNATIONAL; and MONSANTO)	
COMPANY,)	
)	
Defendants-Appellees.)	

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 31st day of January 2005, caused the foregoing to be served on the following persons by electronic mail:

Sarah M. Vogel
Sarah Vogel Law Firm, P.C.
1022 East Divide Avenue
Bismarck, ND 58501
Sarah@svogellaw.com

David A.P. Brower
Milberg Weiss Bershad & Schulman
One Pennsylvania Plaza
New York, NY 10119
dbrower@milbergweiss.com

Stephen A. Weiss
James A. O'Brien, III
Seeger Weiss LLP
One William Street
New York, NY 10004
Sweiss@seegerweiss.com

Adam J. Levitt
Wolf Haldenstein Adler Freeman
& Herz LLC
656 West Randolph Street
Chicago, IL 60661
levitt@whafh.com

Daniel W. Kasner
Scott J. Farrell
Wolf Haldenstein Adler Freeman
& Herz LLP
270 Madison Avenue
New York, NY 10016
Krasner@whafh.com

James P. Denvir / Scott Gant
Boies Schiller Flexner LLP
5301 Wisconsin Ave NW, Ste. 800
Washington, D.C. 20015
jdenvir@bsfllp.com

Patrick J. Ward/Lawrence King
Zuger, Kirmis & Smith
316 North 5th Street
P.O. Box 1695
Bismarck, ND 58502
pward@zkslaw.com

Dated this 31st day of January, 2005

Stephen W. Plambeck
Nilles Law Firm
1800 Radisson Tower
201 North 5th Street
P.O. Box 2626
Fargo, ND 58108
(701) 237-5544
Attorneys for Appellees
splambeck@nilleslaw.com